

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 23, 2007

TO : Irving Gottschalk, Regional Director
Region 30

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Applebee's Neighborhood Bar & Grill 506-4033-0300
Case 30-CA-17444 506-4033-0300
506-0170
506-4033-1700
506-4033-5500
506-6090-1900
512-7550-0133
512-7550-6000

After conducting an additional investigation of alleged disparate treatment under Wright Line,¹ the Region resubmitted this case for advice as to whether the Employer lawfully terminated employees who left work without permission to attend a "Day Without Latinos" demonstration.

We adhere to our original conclusion that the Employer lawfully terminated the Charging Parties.² The evidence shows that the Charging Parties were not similarly situated to other employees who the Charging Parties claim left their work stations without permission but were not discharged. Moreover, the Employer adduced evidence that it has terminated other employees who were similarly situated to the Charging Parties in walking off the job.

Under Wright Line, the General Counsel has the burden of proving by a preponderance of the evidence that animus against union activity or protected conduct was a motivating factor in an adverse employment action.³

¹ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

² See Applebee's Neighborhood Bar & Grill, Case 30-CA-17444, Significant Advice Memorandum dated October 17, 2006.

³ Pollock Electric, Inc., 349 NLRB No. 69, slip op. at 2 (April 6, 2007).

Unlawful motivation may be shown through circumstantial evidence, such as disparate treatment.⁴ Once the General Counsel meets this burden, the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the union or protected activity.⁵

"An essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated."⁶ The Charging Parties claim that employees disappeared from their work stations during busy times, but were rarely—if ever—disciplined, while they were terminated for leaving their work early to engage in protected conduct, i.e., attend the demonstration. Assuming without deciding that the employees' attendance at, or support of, the demonstration was protected activity, there is no merit to the Charging Parties' disparate treatment claim under Wright Line because the Charging Parties were not similarly situated to the employees they cite.

The three Charging Parties together left work without permission; they were gone for four hours to attend the demonstration. The Charging Parties make a number of general assertions that other employees would leave the line during busy periods without being disciplined. The witnesses were able to identify only one employee who did so, however. And, only one witness gave any specifics as to the amount of time that this co-worker may have been away from his work station during a shift, stating that the absences may have been as long as an hour. Finally, the Charging Parties assert that this same co-worker on one occasion left work early without being disciplined.

We find this evidence insufficient to establish disparate treatment of the Charging Parties. First, most of the evidence is too vague to establish that the Employer tolerated conduct similar to the Charging Parties'. Second, even accepting as true the allegations regarding

⁴ Robert Orr/Sysco Food Services, 343 NLRB 1183, 1184 (2004). See also, Sonoma Mission Inn & Spa, 322 NLRB 898, 905 (1997) (treatment of similarly situated employees who were not involved in protected activity is relevant in determining motive).

⁵ Pollock Electric, above, 349 NLRB No. 69, slip op. at 2.

⁶ Thorgren Tool & Molding, 312 NLRB 628, fn. 4 (1993).

the one identified co-worker, the periodic absences from the line ascribed to him are significantly shorter than the Charging Parties'. Indeed, he also may well have been away from his work station for work-related reasons.⁷ In contrast, the Charging Parties left the restaurant as a group after being explicitly told they did not have permission to leave and remained away for four hours during the height of the busy lunch period, leaving the Employer to perform the many tasks—cooking orders, preparing food, replenishing stock, removing garbage—that the Charging Parties would have performed had they stayed. By leaving in the middle of their shifts as a group for this length of time, the Charging Parties had a far greater impact on the Employer's operations than the incidents they ascribed to their co-workers. These employees and the Charging Parties thus were not at all similarly situated under Wright Line.

Similarly, the evidence does not support the Charging Parties' allegation that their named co-worker left work early on one occasion without suffering discipline. That employee states that he did leave early, but with permission, due to a family emergency. Moreover, the Employer later discharged that employee when he missed two shifts within a six day period. The Charging Parties' reliance on this employee's conduct thus does not establish disparate treatment of a similarly situated employee.

Finally, the Employer adduced evidence that it treated similarly situated employees the same way it treated the Charging Parties. The Employer submitted evidence that it had previously terminated employees for walking off the job without permission, for no-call/no-show, and for quitting without notice. This evidence shows that the Charging Party terminations are consistent with the Employer's prior enforcement of its attendance policies.⁸ In these

⁷ The Employer notes that employees have work-related reasons to leave the line during busy times, such as to get additional stock from a cooler, or to assist in another area.

⁸ See also, Publix Super Markets, Inc., 347 NLRB No. 124 (August 31, 2006), quoting Avondale Industries, 329 NLRB 1064, 1066 (1999) and Merillat Industries, 307 NLRB 1301, 1303 (1992): "in the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent [can meet its Wright Line burden] by demonstrating that it has a rule . . . and that the rule has been applied to employees in the past."

circumstances, the General Counsel would be unable to establish disparate treatment and, therefore, could not meet its burden under Wright Line.⁹

The Region should dismiss the charge, absent withdrawal.

B.J.K.

⁹ See, e.g., Consolidated Biscuit Co., 346 NLRB No. 101, slip op. at 4 (April 28, 2006).